

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Received
6/1/14

CIVIL CASE NO. 42 of 2013

BETWEEN: LISA LOUISE PERKO
Claimant

AND: ANZ BANK (VANUATU) LIMITED
First Defendant

AND: BRED (VANUATU) LIMITED
Second Defendant

AND: MALIBU TRADING LIMITED
Third Defendant

AND: THE PINES LIMITED
Fourth Defendant

AND: THE REPUBLIC OF VANUATU
Fifth Defendant

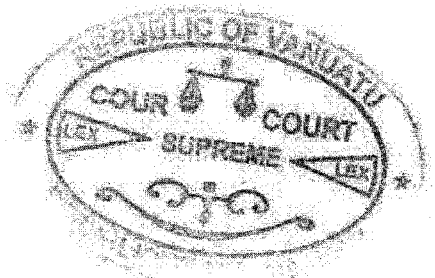
Coram: Justice Mary Sey

Counsel: ~~Mr. Edward Nalyal with him Mr. Sean Mcanally~~ for the Claimant
Mr. Dane Thornburgh for the Third and Fourth Defendants

Date of Decision: 31st January 2014

RULING

1. The claimant, Lisa Louise Perko, has filed an interlocutory application, dated 21st June 2013, seeking the following orders pursuant to **Sections 28 and 65 of the Judicial Services and Courts Act 2000** and **Rules 1.2, 1.7, 9.9(4) and 5.26 of the Civil Procedure Rules 2002** and this Court's inherent jurisdiction:

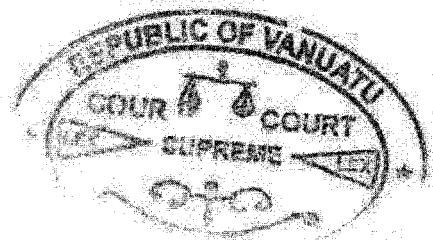


- a. That the whole of the statement of counterclaim filed on 4 June 2013 by the claimants named therein (being the third and fourth defendants in this proceeding) ("the Counterclaim") be struck out and dismissed as against the claimant, (being the first defendant named therein);
- b. Such further or other relief as this Honourable Court deems fit; and
- c. That the third and fourth defendants' lawyer, Dane William Thornburgh, pay the costs of this application personally.

2. The claimant prepared submissions in writing and these were supplemented by oral submissions by Mr. Mcanally premised upon the following grounds:

2.1 The counterclaim is frivolous, vexatious and an abuse of process in that:

- (a) It revives the same claims brought by the third defendant and Dane William Thornburgh in civil case number 19 of 2013, in this Court, they having discontinued that proceeding on or about 29 April 2013; and
- (b) It is unduly prolix and laden with material that is scandalous, argumentative and irrelevant.

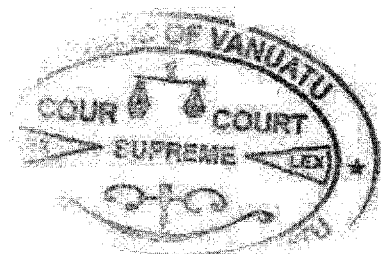


2.2 The counterclaim discloses no reasonable cause of action against the claimant and the grounds relied upon are fundamentally flawed, as matters of law, and that there is no factual dispute that impedes the consideration of this application. Furthermore, the claimant contends that, in the absence of any tenable claim against her, the counterclaim cannot succeed and there are no reasonable grounds upon which this proceeding should have been burdened with the Counterclaim.

3. In support of her application to have the third and fourth defendants' counterclaim struck out as against her, the claimant swore three statements on 21st March 2013, 5th April 2013 and 17th June 2013. Attached to those statements are various documents marked "LLP1" through to "LLP21" respectively.

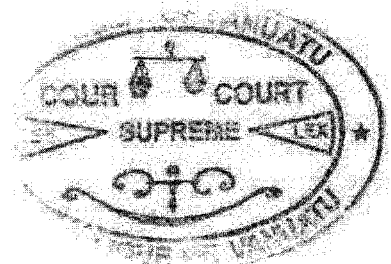
Background

4. It is necessary to recount the background to this proceeding between these parties.
5. The Amended Supreme Court Claim dated 2nd May 2013, in this proceeding, centres upon s.66 of the Companies Act and whether or not a third party mortgage in favour of the first defendant breaches that provision (and, whether or not, the claimant has grounds for rectification of the Land Register against which that mortgage has been entered).
6. The reliefs sought by the claimant are for:
- "(a) An order pursuant to s 100 of Land Leases Act that the register in respect of the Land be rectified by cancellation of the registration of the ANZ Mortgage;
- (b) Costs; and



(c) Any other orders that this Court considers just."

7. In the statement sworn by the claimant on 21st March 2013, she stated that in December 2009, an agreement for the sale and purchase of the shares in the fourth defendant was entered into by Regent Limited & Satellite Holdings limited (as the Vendors) and the third defendant, Malibu Trading Limited or its nominees (as the Purchasers): **"LLP1"**.
8. The claimant also averred that, pursuant to the agreement, Regent Limited and Satellite Holdings Limited sold all of the beneficial rights and interests in the shares to the third defendant for a total consideration of AUD620,000 ("the consideration"). Furthermore, that it was subsequently agreed that the purchaser would pay only AUD300,000 immediately and that the balance of AUD320,000 would be "left in" by the vendors.
9. The claimant also alleged that the first AUD300,000 of the purchase price has been paid but AUD320,000 is still owed and until that balance is paid the shares, the subject of the sale and purchase agreement, are subject to a vendor's lien: **"LLP2"**
10. It is further alleged that in order to partially fund the acquisition of the shares, the third defendant caused the fourth defendant to grant a mortgage over the relevant land to BRED (Vanuatu) Limited: **"LLP5"**. That the borrowing from BRED has, since, been refinanced with the first defendant which has been granted a fresh mortgage by the fourth defendant that has been registered and is the subject of the claim. Further, that **"LLP12"** is a true copy of an advice issued by the Land Records Office advising of registration of the said ANZ Mortgage.



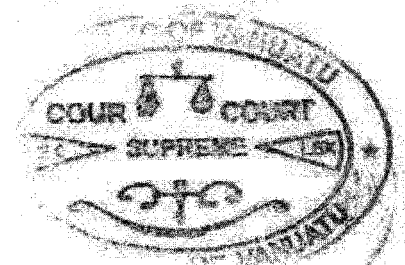
11. In paragraph 13 of the claimant's sworn statement dated 21st March 2013, she averred that in 2011, Regent Limited and Satellite Holdings Limited elected to assign their interest in the remaining debt of AUD320,000 to her: "LLP21", but the steps they took to do so were not legally effective and, as a consequence, effective assignments to her were only completed on 20 November 2012.

The Counterclaim

12. The parties to the Counterclaim filed on 4th June 2013 are **Malibu Trading Limited** (First Claimant), **The Pines Limited** (Second Claimant) And **Lisa Perko** (First Defendant), **Satellite Holdings Limited** (Second Defendant) **Regent Limited** (Third Defendant) and **Geoffrey Gee & Partners** (Fourth Defendant).

13. At paragraph 13 of the counterclaim, the following reliefs are sought:

- "a. *An Order that the Contract dated October 2009 for the Sale & Purchase of the Shares in the Pines Limited is void in its entirety.*
- b. *A Declaration that any contracts or agreements entered into that rely on or refer to the Contract are deemed void in their entirety.*
- c. *A Declaration that there is a resulting trust formed in favour of the First Claimant as Purchaser of the shares over the assets of the company, namely leasehold title no. 11/OY14/033 and that they are the beneficial owner of same subject to the Mortgage of ANZ Bank (Vanuatu) Limited.*
- d. *An Order that the First, Second & Third Defendants do all things*



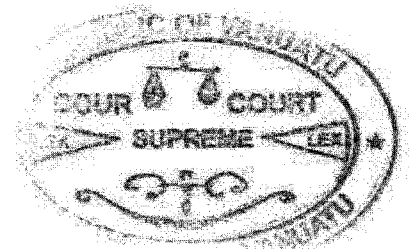
necessary for the preparation and execution of new contracts with correct contracting parties to enable the lawful transfer of the shares to the First Claimant.

- e. *An Order that the Defendants incur all cost associated with same.*
- f. *An Order that the First, Second & Third Defendant pay damages to the Claimants no less than 10,000,000VT".*

15. Further and or in the alternative, the claimants claim that if the contract is found to be binding by the Court, that on or about 20 November 2012 and earlier, the First Defendant purports to have had a debt of the First Claimant assigned to her by the Second & Third Defendants.

16. It appears that the third defendant, as purchaser under the sale and purchase agreement referred to above, is alleging that it is not, in fact and law, the legal owner of those shares and that, consequently, the sale and purchase agreement (as well as the vendor finance contract) should be avoided. Further, that the third defendant be relieved of liability to pay for the balance of the shares and for a declaration to be made that there is some sort of resulting trust in its favour over the assets of the company.

17. There is also an allegation in paragraph 11 e. of the counterclaim about failure to repair the drainage problem from the laundry at the premises so that it does not leak, flooding the bathroom. The claimant contends that if that is the case, and there has been a breach of a term of the contract, that is a matter between the third defendant and



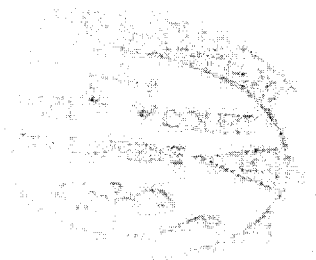
the parties with whom it has contracted and that it has no place in a counterclaim against the claimant.

18. The balance of the counterclaim appears to traverse allegations of negligence against the fourth named counterclaim defendant. However, it is submitted by the claimant that it is not her place to argue for and against those allegations but she does submit that if the counterclaim is struck out as against her it follows that the matters raised are not properly brought before the Court by way of a counterclaim.

Application to strike out

19. The parties concede that jurisdiction exists to strike out a proceeding on the grounds that there is no reasonable cause of action or that it is frivolous, vexatious or an abuse of process. In **Noel v. Champagne Beach Working Committee** [2006] VUCA 18 the Court of Appeal said:

*"Although, as this Court pointed out in **Kalses v Le Manganese de Vate Ltd** [2005] VUCA 2, Civil Appeal Case 34 of 2003 (3 May 2005), there is no specific provision in the Civil Procedure Rules to strike out a proceeding on the grounds that there is no reasonable cause of action or that it is frivolous, vexatious or an abuse of process, it was not disputed that such a power exists. Jurisdiction can be found within the broad terms of ss.28 (1) (b) and 65 (1) of the Judicial Services and Courts Act No. 54 of 2000 and the Civil Procedure Rules themselves provide in Rules 1.2 and 1.7 a basis for exercising the jurisdiction. In practice the existence of such an inherent jurisdiction has been assumed by the Supreme Court: see e.g. the judgments of Treston J in **Naflak Teufi v Kalsakau** [2004] VUSC 94; Civil Case 102 of 2002 (6 May 2004) and **Kalomtak***

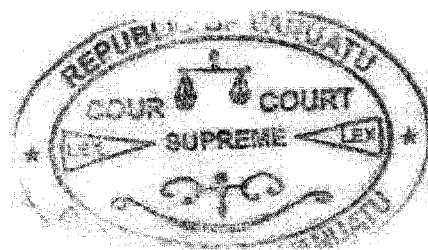


Wiwi Family v Minister of Lands [2004] VUSC 47, Civil Case 14 of 2004 (2 September 2004).

*However it has always been recognised that the jurisdiction should be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material; the claimant's case must be so clearly untenable that it cannot possibly succeed: **Electricity Corp Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641.**"*

See also **Esau v Sur [2006] VUCA16; CAC 25 of 2005; Iririki Island Holdings v Ascension Limited [2007] VUCA 13 and Ebbage v Ebbage [2001] VUCA 7.**

20. The claimant's contention in this application is that the counterclaim is an abuse of process in that it revives the same claims brought by the third defendant Malibu Trading Limited and Dane William Thornburgh in Civil Case No. 19 of 2013 which they discontinued on 29 April 2013: "**LLP19**" and "**LLP20**".
21. To bolster her submissions, the claimant has placed reliance upon Rule 9.94) of the Civil Procedure Rules 2002 which provides that if a "claimant discontinues.....the claimant may not revive the claim".
22. It has been held that Rule 9.9 (4) (a) replaces the old "non-suit" procedure under which claims could be brought again. At common law, a proceeding non-suited could be brought on again for hearing on the same pleadings. However, in Vanuatu, there is no specific power to order a non-suit in the Civil Procedure Rules. See the observation of the Court in **Inter-Pacific Investments v Sulis [2007] VUSC 21.**



Does the counterclaim revive CC No. 19 of 2013?

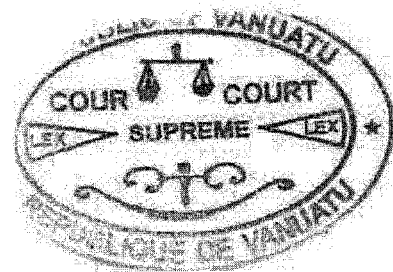
23. The Declarations sought at paragraph 15 of CC No. 19 Of 2013 as appears in "LLP19" are as follows:

"The First & Second Claimants seek the following declarations by the Court:

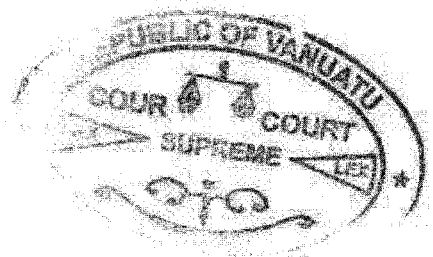
- a. The assignments of the Debt purportedly owing from the First Claimant to the First Defendant is defective and unenforceable and void in its entirety.*
- b. The assignments of the vendors lien purportedly given by the First Claimant to the First Defendant is defective and unenforceable and void in its entirety.*
- c. The assignments of the personal guarantee of the Second Claimant is defective, unperfected and unenforceable and void in its entirety".*

24. At paragraphs 15 - 21 of the counterclaim in CC No. 42 of 2013, it is alleged that Ms. Perko's alleged rights as assignee are misconceived and declarations are sought that the assignments are unenforceable and defective. In particular, the claimants in the counterclaim claim that the assignment dated 20 November 2012 and earlier is defective.

25. It appears to me that these allegations in the third and fourth defendants' counterclaim substantially mirror those brought by the third defendant and Mr. Thornburgh in proceeding 19 of 2013 commenced in this Court on 17th February 2013.

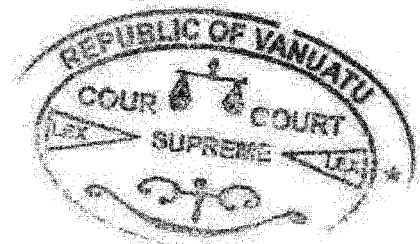


26. For their part, the third and fourth defendants forcefully submit that the claimants in the discontinued proceeding CC No.19 of 2013 were Malibu Trading Limited and Dane William Thornburgh and that The Pines Limited was never a party to the earlier claim in CC No. 19 of 2013. They further contend that any allegations as made by The Pines Limited in this proceeding could not be found to be the subject of any restriction as relative to the discontinuance of the earlier case, as they were simply not a party to the earlier discontinued case.
27. To my mind, this submission is untenable. it is quite clear that Dane William Thornburgh, second claimant in CC No. 19 of 2013 has simply been replaced by The Pines Limited as the second claimant in the counterclaim in CC No. 42 of 2013.
28. It can also be seen that the first and second causes of action, in that proceeding, rely upon substantially the same grounds to escape the consequence of the vendor finance agreement and the assignment of the rights under it to the claimant. In essence, the counterclaim in CC No. 42 of 2013 can be perceived as a commencement of new proceedings that in substance advance the same claim which was discontinued in CC No. 19 Of 2013.
29. I note Mr. Mcanally's submission that, if Rule 9.9, which codifies the procedure pertaining to discontinuances, included a right to bring fresh proceedings as is the case in some other jurisdictions, it would say so. Counsel further submitted that it is also telling that Rule 9.9 (4)(a) refers not to a "proceeding" but to a "claim" and that while a claim must be started to instigate a proceeding, it is not the same as the proceeding. It follows, in the claimant's submission, that a claim that



is substantially the same as one brought in a discontinued proceeding is barred by Rule 9.9 (4) (a). I agree.

30. If one has identical claims in two civil proceedings, one cannot simply discontinue one and proceed with the other because that would be getting around Rule 9.9 (4). It does not matter why one discontinues as the reasons for discontinuance are irrelevant. What matters is the fact that one has discontinued. See **Hapsai v Family Albert** [2012] VUSC 4; Land Appeal Case 14-93 (26 January 2012), where the Court stated that "*the reason(s) why the appellant filed a Notice of Discontinuance does not alter the legal effect of the Notice*".
31. The reasons advanced by Mr. Thornburgh in the Notice of Discontinuance filed on 29th April 2013 in CC No. 19/13 is that the same matters are now raised in this proceeding CC No. 42/13 and as a result the pleadings in CC No. 19/13 was "superfluous." If that were the case, the proper course was consolidation of the two proceedings under Rule 3.4 of the Civil Procedure Rules rather than discontinuance and all that flows from it.
32. It is also submitted that the counterclaim is so prolix, and laden with scandalous and irrelevant material, that it amounts to an abuse of process.
33. In his oral submissions, Mr. Thornburgh argued that the pleadings are not repetitive and that the counterclaim has reasonable prospects of success.
34. Rule 4.2 of the Civil Procedure Rules 2002 requires that:



"Each statement of the case must:

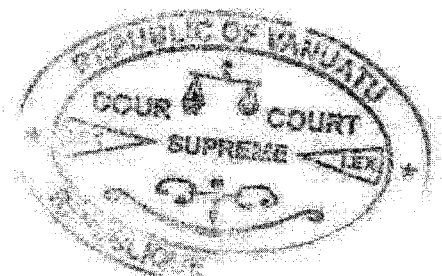
- (a) Be as brief as the nature of the case permits; and*
- (b) Set out all the relevant facts on which the party relies but not the evidence to prove them; and*
- (c) Identify any statute or principle of law on which the party relies, but not contain the legal arguments about it..."*

35. The purposes of Rule 4 are to avoid cases becoming embroiled in long interlocutory procedural arguments over pleadings. The Court, undoubtedly, has jurisdiction to strike out a pleading that is unnecessarily prolix. In **Hill v Hart-Davis** (1884) 26 Ch D 470 (CA) the relevant affidavit which was struck out was described as "unnecessarily and oppressively long." More Recently, the High Court of England and Wales, in **Eric Barnes v Handf Acceptance & Ors** [2004] EWHC 1095 struck out some amended proposed particulars of claim on the basis that:

"The lengthy process of unraveling, understanding, answering and adjudicating on them would defeat the overriding objective and would constitute an abuse of the process of the Court."

36. Here in this present application, the counterclaim runs to 14 pages and the prolixity of the document is caused by the unnecessary pleading of contractual terms and constant repetition of the same allegation in different ways to add effect or emphasis.

37. Mr. Thornburgh submits that the way the counterclaim has been done is the way it should be under Rule 4.8 and that the obligation to particularise the claim has been met.



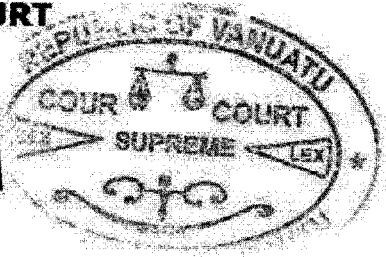
38. I have considered the document and suffice it to say that I do not think it is appropriate for the Court and the claimant Lisa Louise Perko to have to wade through the counterclaim as pleaded. The particulars could have been shorter but, as was stated in **Eric Barnes v Handf Acceptance & Ors**, *"they are none the less extraordinary in their discursive formulation."*
39. As Mr. Mcanally submits, quite correctly, the grounds relied upon by the third and fourth defendants are fundamentally flawed, as matters of law, and the counterclaim as against the claimant cannot succeed. There is no factual dispute that impedes the consideration of the claimant's application and it should not be permitted to impede this proceeding further.
40. After careful consideration, I am satisfied that the Court need not trouble itself with any further determination of the reasonable prospects of success as advanced by the third and fourth defendants.
41. It follows that I will accede to the claimant's application to strike out the counterclaim as against her on the grounds of abuse of process.
42. In exercising my discretionary powers, and in particular being mindful of the overriding objective to ensure there is fairness as between the parties, I hereby order that the third and fourth defendants' counterclaim as against the claimant must be and is hereby struck out with costs on a standard basis to be taxed if not agreed.

DATED at Port Vila, this 31st day of January, 2014.



BY THE COURT

M.M. Sey
M.M. SEY



Judge